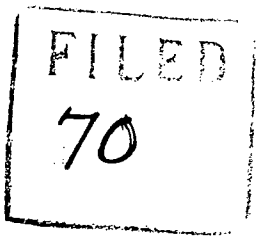
PROSECUTING ATTORNEY:
CIVIL ACTIONS:
COUNTIES:

1. An action instituted by a Prosecuting Attorney, ex officio, for the abatement of an obstruction across a county road is an action brought by the State; 2. Although such action is unsuccessful by reason of adverse judgment or a continuance at any state of the proceedings no costs can be collected from the State; 3. In such a situation the county in which the action was begun would not be liable for such costs.

February 1, 1954

OPINION NO. 70

Honorable John P. Peters
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Mr. Peters:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "On July 5th, 1952, I as prosecuting attorney, instituted an action in the name of the State of Missouri v. Loyd Ridenhour, and two others as commissioners, of 'Jefferson Township Special Road district', of and in said Township, in Osage County, to restrain them from erecting a certain 'Low Water Bridge' in and across Mistaken Creek, in said Road District, where a county public road crosses said creek, alleging that the said proposed construction, if erected would be an obstruction and purpresture, in said road, and creek, and praying in the name of the state's visitorial power, for a temporary restraining order, which was granted by Judge R. A. Breuer, at the time, restraining the said Commissioners, from erecting, the said proposed structure in said road and creek.
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> "The cause came on for trial, at the October Term, 1952, of the Osage County Circuit Court, and at the close of the state's case, the Court, dismissed the state's petition and dissolved the temporary restraining order; whereupon,

> the state in due time filed motion for a new trial, later overruled, and notice or appeal, duly given and lodged in St. Louis Court of Appeals. However, before time to file transcript and brief the case, in the Appellate Court. It was agreed between the Prosecuting Attorney and the Commissioners of said Road district, (Board having changed in personnel, by an election), that the state was to let the case or the appeal die, in the Appellate Court, and that the new board of Commissioners would not attempt to erect the construction of the said alleged purpresture, in accordance with this agreement, the appeal was suffered to die, 'For Failure", Etc. which it did, about Sept. 15, 1953. Mandate came down, of dismissal, costs adjudged against the plaintiff-State. Two cases of this nature are: State ex rel. Orear Pros. Atty Audrain County, vs. City of Vandalia, and State ex rel Peters vs. J. D. Franklin and the City of Linn, First is 119 App. Page 406, and latter is 133 App. page 486.
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> "My Problem is: Is the State, or the County of Osage liable for these costs? It of course is one or the other, surely. Your Opinion will be appreciated."

It seems clear to us that when you initiated the above-described action you were acting in behalf of the State, and that you were acting within your authority as Prosecuting Attorney.

In regard to this matter you direct your attention to the case of State ex rel. vs. Vandalia, 119 Mo.App.406. In that case the City of Vandalia, a fourth class city located in Audrain County, together with two individuals, Coontz and Waters erected in a public street in Vandalia "a large high platfrom and shed * * * sixty feet in length and about thirty-five feet in width * * *." The Prosecuting Attorney of Audrain County filed an action to abate a nuisance in which he requested the Court to order this structure removed. The Missouri Supreme Court held that in so acting the Prosecuting Attorney was acting in behalf of the State and was acting within his authority as Prosecuting Attorney. At l.c. 418-419 of its opinion the Court stated:

> "* * * The Attorney General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the state, for its abatement. This is the rule independent of any

statute touching the matter, as has been adjudged in many cases. (Smith v. McDowell, 148 Ill. 51, 22 L.R.S. 393; State v. Dayton, 36 Ohio St. 434; Hunt v. Railroad, 20 Ill.App. 282; People v. Beaudry, 91 Cal. 213, 220.) We apprehend that the right of those officials to interfere, grows out of the visitorial power of the State in respect to trusts of a public nature, and that the interference is akin to the suits in equity brought by attorney-generals for the regulation of public charities, which are frequently met with in the reports. (Atty. Gen. v. Haberdasher Co., 15 Beav. 307; Parker, Att. Commonwealth, v. May 5 Cush. (Mass.) 336.) The urual mode of proceeding in seeking relief respecting either charities for purprestures and other nuisances, is by an information in equity; which pleading corresponds nearly to a bill in equity filed by a private suitor for his own benefit. The information is in behalf of the sovereignty of the State, to redress some grievance of which the State may complain in equity on its own account, or on account of persons or interests under its special protection; like idiots, lunatics and charities. And informations in equity are filed by the officer representing the sovereignty of the State; that is to say, the Attorney General, or, in this commonwealth, some prosecuting attorney. This sort of information possesses most of the charactaristics of a bill in equity and differs from the latter in form rather than in function. (1 Ency. Pl. and Pr., pp. 857, 859; Story, Eq. Pl., sec. 8; People v. Stratton 25 Cal. 242.) Some of the formal differences between the two are pointed out in the opinions in Atty. Gen. v. Mcliter, 26 Mich. 444, 449, and Atty. Gen. v. Evart B. Co., 34 Mich. 462, 472. The right of the prosecuting attorney of Audrain County to maintain the present proceeding is made clear by both ancient and modern decisions of equity courts and is supported by a statute of this State, which provides that whenever any property, real or personal, is held by a municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction of a proceeding instituted in the name of the Attorney General or prosecuting attorney to inquire into any breaches of trust, fraud or negligence and to administer proper relief.

> (R.S. 1899, sec. 6130). An inquiry into breaches of trust and fraud would naturally be conducted by a court of equity and according to equity pleading and practice. A purpresture in a highway is a grievance of sufficient importance to justify its abatement at the instance of the State. (Att. Gen. v. Evart B. Co., 34 Mich. 473; State v. Dayton; Hunt v. Railroad, People v. Beaudry, supra)."

You also direct our attention to the case of State vs. Franklin, 133 Mo.App. 486. In that case one Franklin erected, within the city limits of the city of Linn, which is within Osage County, on a public highway, a building which completely obstructed passage over that highway.

The Prosecuting Attorney of Osage County, instituted an action against Franklin to compel him to remove this obstruction. In its opinion the Missouri Supreme Court stated that such an action was brought in behalf of the State. At l.c. 491 of its opinion the Court stated:

> "* * * The power over the public ways conferred by the laws of the State is in the nature of a trust which the municipality must execute in furtherance of the object of the trust, and where the municipality is guilty of a breach of this trust by acts either of commission or omission, the visitorial right of the State empowers it to proceed in court to correct the abuse. This it may do through the arm of the Attorney-General or of the prosecuting attorney of the county wherein the nuisance is maintained, by suit in equity, or suit brought under section 6130, Revised Statutes 1899, which provides:
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> "'Whenever any property, real or personal, is held by any municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction upon proceedings instituted in the name of the Attorney-General or prosecuting attorney, to inquire into any breaches of trust, fraud or negligence, and to administer the proper relief.' * * *"

The case of State ex rel. vs. Lamb, 237 Mo. 437, was one in which the Prosecuting Attorney of Chariton County filed an action for injunction to suppress a nuisance. In holding that he acted on behalf of the State, the Missouri Supreme Court, at l.c.453 of its opinion, stated:

> "It is clear that if the prosecuting attorney acts at all ex officio, he must act for and in behalf of the State. If he has power to act for the State, and institute proceedings at his discretion, as we think he has, then it follows that proceedings instituted by him of the character in question are in behalf of the State, and that no bond is required. It will not do to say that the prosecuting attorney may ex officio properly institute injunction proceedings in behalf of the State, and still be required to give bond. He has no right to institute the proceeding at all as prosecuting attorney unless he does so in behalf of the State. 'Acts of public officers acting on behalf of the State, within the limits of the authority conferred on them, and in the performance of their duties, are the acts of the State.' * * *."

In view of the similarity of the fact situation in your instant case to the fact situations in the cases cited, and in view of the fact that the cases cited sustain the proposition that a Prosecuting Attorney taking such action as you did take in the instant case, acts on behalf of the State and is within the scope of his authority in so doing, it is our opinion that in the instant case you acted within the scope of your authority as Prosecuting Attorney of Osage County, and that the action you brought was brought on behalf of the State and not on behalf of Osage County. Such being true, it is our further opinion that Osage County would not be liable for the costs in this case in any event, and that the only matter remaining for our determination is whether or not the State would be liable.

For light in this matter, we turn to the case of Murphy vs. Limpp, 147 S.W. (2d) 420. This was an action by one Murphy, Chairman of the Unemployment Compensation Commission of Missouri, against one Limpp, to collect contributions under the provisions of the Unemployment Compensation Law. A judgment for the defendant below was affirmed by the Missouri Supreme Court, but that part of the judgment sustaining costs against the appellant, Murphy, was reversed. At l.c. 423 of its opinion the Court stated:

> "The trial court entered a judgment for the costs incurred against appellants. This action was assigned as error, and appellants contend that the state is not liable for the costs in a case of this character. In 59 C.J., p. 332, Sec. 503, we read: 'It is a general and well established rule apart from statute that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated. Therefore, absent a statutory provision, the costs were erroneously assessed against the state. Respondent cites Section 1255, R. S. 1929, Mo. St. Ann. Sec. 1255, p. 1476, but that section, as we read it, does not govern an action of this nature. Its provisions are expressly confined to actions on contracts by the state, such as bonds, etc."

From the above we conclude that costs cannot be assessed and collected against the State unless there is statutory provision to that effect. Such a provision was present, as was pointed out by the Court, in regard to the type of action stated in Section 1255, R. S. Mo. 1929, which is now Section 514.190 RSMo 1949. That section reads:

> "In suits upon obligations, bonds, or other specialties, or on contracts, express or implied, made to or with the state, or the governor thereof, or any other person, to the use of the state, or to a county, or the use of a county, and not brought on the relation or in behalf or for the use of any private person, if the plaintiff shall recover any debt or damages, costs shall also be recovered as in other cases; but if such plaintiff suffer a discontinuance, or suit be dismissed, or non pressed, or if a verdict shall be found in favor of the defendant, he sahll recover his costs."

Section 514.200, RSMo 1949, reads:

> "In all such cases, the judgment against the state or county shall not be for costs generally, but the amount thereof shall be expressed in the judgment, and no such judgment shall afterwards be amended so as to increase the amount

> for which it was originally entered; and, upon a transcript of such judgment, together with a certified copy of the fee bill, showing the items of cost, being presented to the state auditor or the county court, the same shall be audited and allowed."

However, in the type of action instituted by you in the instant case we are unable to find any statutory provisions whereby the State is obligated to pay costs, and in such absence, in the light of the holding in the case of Murphy vs. Limpp, supra, we believe that the State is not so liable.

CONCLUSION

It is the opinion of this department:

1) That an action instituted by a Prosecuting Attorney, ex officio, for the abatement of an obstruction across a county road is an action brought by the State;

2) That although such action is unsuccessful by reason of adverse judgment or a discontinuance at any state of the proceedings no costs can be collected from the State;

3) In such a situation the county in which the action was begun would not be liable for such costs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General